SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 279

STANDARD OIL COMPANY OF CALIFORNIA AND STANDARD STATIONS, INC.,

Appellants,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE SOUTHERN DISTRICT OF CALIFORNIA

STATEMENT AS TO JURISDICTION

MARSHALL P. MADISON,

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Civil Action No. 6159-Y

UNITED STATES OF AMERICA,
Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA AND STANDARD STATIONS, INC.,
Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, as amended, defendants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final judgment of the District Court entered in this cause on June 30, 1948. A petition for appeal is presented to the District Court herewith, to-wit, on July 20, 1948.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as

amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 272, 15 U. S. C. A. 29); and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938, 28 U. S. C. A. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this cause: *Interstate Circuit, Inc. v. United States*, 306 U. S. 208; *United States v. Crescent Amusement Co.*, 323 U. S. 173; *Associated Press v. United States*, 326 U. S. 1.

Statutes Involved

The pertinent provisions of Section 1 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. A. 1), commonly known as the Sherman Act, are as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . ."

Section 3 of the Act of October 15, 1914, as amended (38 Stat. 731, 15 U. S. C. A. 14), commonly known as the Clayton Act, is as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to sub-

stantially lessen competition or tend to create a monopoly in any line of commerce."

The Issues and the Ruling

This is an equity suit brought by the United States of America in the Federal District Court for the Southern District of California, Central Division, charging that the two corporate defendants, Standard Oil Company of California (herein called "Standard"), and the latter's wholly owned subsidiary, Standard Stations, Inc., had violated Sec. 1 of the Sherman Act and Sec. 3 of the Clayton Act for at least fifteen years.

To support this charge plaintiff alleged the following: Defendants had entered into contracts and subleases with independent dealers[1] in gasoline and other petroleum products and tires, tubes, batteries and other automotive accessories in the States of California, Oregon, Washington, Arizona, Nevada, Idaho and Utah. These contracts and subleases obligated Standard to sell and the dealer to buy from Standard during a stated term all petroleum products, and, in certain cases, all petroleum products, tires, tubes and batteries, required by the dealer for resale at his service station or garage. This was said to unreasonably restrain, and to have the effect of substantially lessening competition and tending to create a monopoly in, the commerce in these products in such area.

The making of the contracts and subleases was not denied. Issue was joined by denial of plaintiff's charge that they unreasonably restrained commerce or had or might have the effect of substantially lessening competition or tending to create a monopoly in commerce. Defendants affirma-

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[1] Standard in the area involved also operated a number of service stations through its own employees. Operations affecting these employee-operated service stations, known as "Standard Stations," are not complained of in this case.

tively alleged that contracts and subleases of this character had long been employed by defendants' competitors; that the practice had arisen and been pursued because dealers required over a definite period a supply of these products to satisfy their requirements; that defendants' contracts and subleases were the outgrowth of competition; that defendant's competitors in the area in question were numerous and aggressive; and that, but for these contracts and subleases, the competition of defendants for the trade of the dealers would have been eliminated.

The cause was tried in the District Court during May, 1948. Plaintiff introduced in evidence the contracts and subleases; showed that they affected 5197 dealers in Standard's products within the area in question; and introduced evidence which, it was contended, showed that the annual purchases by such dealers of Standard's products amounted to $68,000,000.00 and that Standard's retail dealer sales of gasoline were 12% to 14% of the total.

Much of defendants' evidence dealt with the competitive picture. Among other matters, defendants' uncontradicted evidence showed that in 1946 in the Los Angeles area (the largest retail gasoline market in the world) Standard's gasoline retail dealer sales were 2.43% of the total, and in the San Francisco area 5.52% of the total; that in 1946 in the seven Western states Standard's retail dealer sales of lubricating oil were 5% of the total; of tires, 2% of the total; and of batteries, 1.8% of the total; that Standard pursued a policy of contracting with the fewest possible number of dealer outlets consistent with its service of the marketing area; that such outlets were not so territorially concentrated as to even suggest a monopoly of any part of such area; that the number of Standard's dealer outlets had decreased substantially over a ten-year period; that Standard's dealer outlets represented only a small fraction of the total outlets; that the total number of retail outlets

for gasoline in the seven-state area was approximately 36,500 and many more than that number for tires, tubes and batteries; that Standard throughout the area had powerful, aggressive and numerous competitors,[2] a number of whom had dealers exclusively handling their products, and a number of whom had expanded their dealer sales to a far greater degree than Standard; that the six principal oil company competitors of Standard had more than 20,000 gasoline dealer outlets in the seven-state area, each one of which outlets handled exclusively the gasoline of a single company; that of the 36,500 retail outlets for gasoline in such area 98.4% handled exclusively the gasoline of a single supplier; that Standard's dealer sales had not increased in volume out of proportion to the general increase in volume enjoyed by the rest of the industry in the area in question and, in certain areas and in the case of certain products, had markedly fallen behind industry sales as a whole; that competitors of Standard had suffered no financial detriment from the practices complained of but, on the contrary, had grown and presumably prospered; and that both dealers and the motoring public had benefited substantially from the service maintained by Standard as a part of the marketing system of which the contracts and leases were an integral part.

On June 7, 1948, the District Judge filed his opinion, a copy of which is annexed, announcing a decision in favor of plaintiff. Therein he called attention to the number of outlets under Standard's contracts and subleases and to the volume of business done by these outlets, and concluded that, irrespective of competitive conditions, the market as a

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[2] In the seven-state area there were 80 competitor companies each of which marketed over 1,000,000 gallons of gasoline annually; there were 69 competitor companies marketing their own brands of lubricating oil; and competitor companies distributing gasoline promoted through retail outlets handling their products 27 different lines of tires and 28 different lines of batteries, all competitive with Standard's products.

whole, and Standard's competitive position, this was enough to warrant an injunction. Thus he said:

"... *As the restriction corners a market of the value of $68,000,000.00, it is illegal, even considered on a comparative basis.* Concede further, that the arrangement was entered into in good faith, with the honest belief that control of distribution and consequent concentration of representation were economically beneficial to the industry and to the public, that they have continued for over fifteen years openly, notoriously and unmolested by the Government, and have been practiced by other major oil companies competing with Standard, that the number of Standard outlets so controlled may have decreased, and the quantity of products supplied to them may have declined, on a comparative basis. *Nevertheless, as I read the latest cases of the Supreme Court, I am compelled to find the practices here involved to be violative of both statutes. For they affect injuriously a sizeable part of interstate commerce, or,—to use the current phrase,—'an appreciable segment' of interstate commerce.*"

Deeming this contrary to *United States* v. *Columbia Steel Co.*, — U. S. —,[3] decided the same day, defendants promptly moved to reopen the case and for further argument, reconsideration and a revision of the opinion and for findings and judgment in favor of defendants. This motion was denied on June 28, 1948. On the same day, the trial Judge filed a second or "supplemental opinion," a copy of which is annexed.

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[3] Therein it was said:

"In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market."

Findings of fact and conclusions of law herein were filed on June 30, 1948, and a final judgment herein in favor of plaintiff was entered on June 30, 1948.

The findings of fact ignore the competitive setting disclosed by defendants' uncontradicted evidence, *i.e.*, the number, growth, strength, operations and practices of defendants' competitors, the character and extent of the market, and Standard's position in the competitive picture.

The Questions Are Substantial

The District Court was of the view that the anti-trust laws were violated solely upon a showing that the contracts between Standard and its customers excluded competitors from supplying the requirements of such customers.

Yet every contract for a future supply excludes competitors from supplying the buyer's requirements of the products contracted for by such contract. Are all supply contracts to be declared illegal under the anti-trust laws provided they embrace a sizeable quantity? This is the effect of the District Court's decision. The repercussions of such doctrine would be immeasurably disastrous.

The District Court declared that the contracts were not unlawful *per se;* that they became unlawful only because of their effect. Nevertheless, in assessing their effect, the District Court disregarded the entire competitive picture, *relying solely upon the number of such contracts and the volume of goods sold thereunder.* It was said to be enough that this "appreciable segment" of commerce (*i.e.*, Standard's dealers) was affected, *irrespective of conditions in the market generally and Standard's competitive position.* Despite a large amount of evidence showing such conditions and Standard's competitive position, findings relating thereto were not made, doubtless because of the District Court's belief that this made no difference. Defendants' good faith, economic benefit to the public as against detri-

ment to ensue from an abolition of this system of distribution,[4] and a total lack of any specific purpose or intent on the part of defendants to restrain competition or monopolize, were likewise regarded as inconsequential.

The District Court's decision extends the rule of *United States* v. *Yellow Cab Co.*, 332 U. S. 218, to facts bearing no resemblance to the facts underlying the *Yellow Cab* case, and disregards the pronouncement of the Supreme Court in *United States* v. *Columbia Steel Co.* (June 7, 1948) that the holding in the *Yellow Cab* case did not make illegal the acquisition of an outlet "without consideration of its effect on the opportunities of other competitor producers to market their" products.

If the District Court's decision were to govern:

(A) Doubt would arise concerning the legality under the anti-trust laws of many large supply contracts and supply contracts with a large number of purchasers in many lines of industry and commerce throughout the nation, *irrespective of the competitive conditions involved.*

(B) There would be conflict with the rule that where the contract attacked is not illegal *per se* and no specific intent to violate the anti-trust laws has been shown, *competition must be shown to have been lessened "to such a degree as will injuriously affect the public."* *International Shoe Co.* v. *Federal Trade Comm.*, 280 U. S. 291, 297, 298.

(C) There would be conflict with the rule that in a case of this character *the trial court must "look . . .. to the percentage of business controlled, the strength of the re-*

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[4] At the trial the court announced that it would not "allow any testimony regarding the effect of this arrangement on prices"; that "the unreasonableness of the restraint under the Sherman Act and the substantiality of the restriction under the Clayton Act are not affected by the price at which the product is sold to the public"; and that it would not allow testimony as to the "economic merits or demerits of the present system as contrasted with a system which prevailed prior to its establishment."

maining competition, whether the action springs from business requirements or purpose to monopolize; the probable development of the industry, consumer demands, and other characteristics of the market." United States v. *Columbia Steel Co.*, — U. S. — (June 7, 1948).

It is respectfully submitted that the Supreme Court has jurisdiction upon direct appeal, and that the questions presented are substantial.

Dated: July 20, 1948.

MARSHALL P. MADISON,
JOHN M. HALL,
Attorneys for Defendants.

(Italics in the foregoing have been added.)

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

No. 6159-Y Civil

UNITED STATES OF AMERICA, Plaintiff,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, AND STANDARD STATIONS, INC., Defendants

Opinion

APPEARANCES:

For the Plaintiff: William C. Dixon, Special Assistant to the Attorney General, W. Alan Thody, Special Assistant to the Attorney General, Lawrence W. Somerville, Special Attorney Anti-Trust Division, Theodore Driscoll, Special Attorney Anti-Trust Division, Tom C. Clark, Attorney General, James M. Carter, United States Attorney.

For the Defendants: Lawler, Felix & Hall, By, John M. Hall, Pillsbury, Madison & Sutro, By Everett A. Mathews.

By this suit in equity, the Government seeks a decree adjudging that certain practices engaged in by the defendants and certain contracts entered into by them, unreasonably restrain interstate trade and commerce in violation of Section 1 of the Sherman Anti Trust Act (1), and substantially lessen competition and tend to create a monopoly in a line of commerce, in violation of Section 3 of the Clayton Act. (2) The Government asks us to declare the exclusive supply provisions in the contracts and the practices flowing from them to be void and of no effect.

In addition, we are asked to enjoin the defendants, in perpetuity, from entering into or enforcing any contract, agreement, or understanding, express or implied, with any independent service station operator or garage operator,

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[1] 15 U.S.C.A., Sec. 1.

[2] 15 U.S.C.A., Sec. 14.

or from inducing or compelling, or attempting to induce or compel, any such person from entering into any contract, agreement or understanding, which has any of the following requirements:

(a) That the Independent Service Station Operator or Garage Operator shall secure all his requirements of petroleum products from defendant Standard, or shall not handle the petroleum products of any other company;

(b) That the Independent Service Station Operator, or Garage Operator shall secure all his requirements of any one or more types of automobile accessories from or through defendants Standard and Standard Stations, Inc., or will not handle accessories competitive with those distributed or sponsored by defendants, Standard and Standard Stations, Inc.

(c) That the sale of any petroleum product or automotive accessories to any Independent Service Station Operator, or Garage Operator shall be conditional on the sale of other pertoleum products or automotive accessories.

The action was instituted on January 2, 1947. Many proceedings have taken place before the trial and an extensive file has been built up. However, as a case of this character must be determined on the basis of facts existing at the time of the trial, it is not necessary to give a detailed analysis of the pleadings in the case or the proceedings before the court.

What precedes is sufficient for the purpose of the discussion to follow.

YANKWICH, *District Judge:*

I

The Proved Facts

Notwithstanding the lengthy trial and the large number of exhibits introduced, the issues in the case are rather narrow, as will appear further on in the opinion when we expound the legal principles which control the case.

There is, therefore, no need to review elaborately the facts proved. A brief summary will suffice.

The defendant Standard Oil Company of California is a Delaware corporation with its principal place of business at San Francisco, California. It is engaged in the business of producing, transporting, refining and marketing petroleum and petroleum products, principally, in the states of California, Oregon, Washington, Arizona, Nevada, New Mexico, Idaho and Utah.

The defendant Standard Stations, Incorporated, is a corporation organized under the laws of Delaware with its principal place of business at San Francisco. It is a wholly-owned subsidiary of Standard Oil Company of California, and is engaged in the business of managing service stations in the seven states just mentioned. The number of these stations is 1063.

As the issues have narrowed themselves by the proof, no further reference need be made to these stations so operated which have been referred to in the evidence as "employe operated stations.". The Government does not question (indeed, it could not) the right of the Standard Oil Company of California to operate its own stations and sell therein any product it manufactures or distributes. Hence when we refer to "Standard" in what follows, it will be understood that the reference is to Standard Oil Company of California, the parent company, actually engaged in what, for brevity, we shall call "the oil business".

The evidence in the cases shows that, as of March 12, 1947, Standard, in addition to the company operated service stations, had contractual arrangements with 7145 stations in the area. The relationship of Standard to these stations was governed by the five types of agreements entered into with the operators of the stations. They were:

(1) "Dealer Agreements," of which there were 1656, containing the following clause:

"1. Standard Oil Company of California, a corporation hereinafter called 'Company' agrees to sell to —— hereinafter called 'Dealer,' and Dealer agrees to buy from Company, all of Dealer's requirements of petroleum products

used or sold or bought to be used or sold by Dealer at —. The petroleum products to meet Dealer's requirements hereunder shall be those brands of gasoline, lubricating oils, and other petroleum products sold by Company to its dealers generally in Dealer's vicinity."

(2) "Distributor Agreements," of which there were 556, containing the following:

"Company agrees to sell to Distributor, and Distributor agrees to buy from Company and stock and offer for sale all of Distributor's requirements of petroleum products used or sold or bought to be used or sold by Distributor in the conduct of his business on the premises hereinafter described. The petroleum products to meet Distributor's requirements hereunder shall be those brands of gasoline, lubricating oils and other petroleum products currently sold at service stations operated by Standard Stations, Inc. in Distributor's vicinity, and Distributor agrees not to store, handle, distribute, or sell any other brand or brands of petroleum products at or from the station."

(3) "Petroleum Products and Equipment Agreements", of which there were 912, containing this clause:

"1. Standard Oil Company of California, a corporation, hereinafter called 'Company', agrees to sell to —— hereinafter called 'Dealer', and Dealer agrees to buy from Company, all of Dealer's requirements of petroleum products used or sold or bought to be used or sold by Dealer at ——. The petroleum products to meet Dealer's requirements hereunder shall be those brands of gasoline, lubricating oils, and other petroleum products sold by Company to its dealers generally in Dealer's vicinity."

(4) "Dealer Agreement TBA", of which there were 2221, having this clause:

"1. Standard Oil Company of California, hereinafter called 'Company', agrees to sell to —— hereinafter called 'Dealer', and Dealer agrees to buy from Company, all Dealer's requirements of petroleum products used, sold, or bought to be used or sold, by Dealer at ——, hereinafter called 'said premises.' The petroleum products to meet

Dealer's requirements hereunder shall be those brands of such products generally sold by Company to its Dealers."

(5) "Sublease Agreements", of which there were 1800, containing the following clause:

"Lessee shall handle and sell on the leased premises only such petroleum products as are sold Lessee by Lessor, and Lessee agrees not to store, handle, sell, or distribute on or from said premises any petroleum products of any description other than those petroleum products sold to Lessee by Lessor. The price payable by Lessee to Lessor for said petroleum products shall be Lessor's posted price for the same or similar products to its Dealers generally in Lessee's vicinity at time and place of delivery."

The choice of the type of agreement was the dealer's. And the agreements were terminable by him on six months' notice. Each of these agreements contained provisions which, both by the language used and the limitations of liability, stressed the character of the agreement as seeking to establish the dealer as an independent contractor. Dealer Agreements (Class I) contained the most elaborate provisions. They are here given in full:

"6. Dealer acknowledges that he has thoroughly inspected the pumps, tankage, containers, pipes, and other facilities on the premises and that the same are in good condition, and while this agreement is in force Dealer agrees to so keep the same at Dealer's own cost and expense; provided, however, that Company may, at its discretion, maintain and repair said facilities. Dealer further agrees to protect, defend, and hold harmless the Company against all claims for damage to property (including Dealer's property), or injury to or death of persons, directly or indirectly resulting from any acts or omissions of Dealer or Dealer's employees in or about said premises, either in the maintenance or operation of the tanks, containers, pipes, pumps and other facilities thereon, or in the vending therefrom of the products and goods handled by Dealer hereunder.

"7. In the performance of this agreement Dealer is engaged in an independent business and nothing contained shall be construed as reserving to Company any right to

control Dealer with respect to his conduct in the performance of this agreement. Company reserves no right to exercise any control over any of Dealer's employees and all employees of the Dealer shall be entirely under the control and direction of Dealer who shall be responsible for their actions and omissions. Dealer will, at his own expense, during the term hereof, maintain full insurance under any Workmen's Compensation Laws effective in said state covering all persons employed by and working for him in connection with the performance of this agreement, and upon request shall furnish Company with satisfactory evidence of the maintenance of such insurance. Dealer accepts exclusive liability for all contributions and payroll taxes required under Federal Social Security Laws and State Unemployment Compensation Laws as to all persons employed by and working for him in connection with the performance of this agreement.

"8. Any tax, or the amount thereof, now or hereafter imposed, levied, or assessed by any governmental authority upon, measured by, incident to, or as the result of the transaction herein provided for, or the transportation, production, or manufacture of the goods, the subject matter of this agreement, shall, if collectible or payable by the Company, be paid by the Dealer on demand by the Company, as tax collectible or as an increase in the prices otherwise herein provided for."

The other types of agreement aimed to achieve the same result.

The history of the use of the various types of agreement shows that, beginning in 1938, the dealer agreements begun to supersede the authorized distributor agreements which had obtained before that date, and that, beginning with the year 1944, Type 4 (TBA) came into almost exclusive use. There is duplication of agreements in that a single station may operate under several types of agreements. Hence the actual number of gas station outlets is 5197. The number of stations operating under Form 2 has since been reduced to 232. In addition to this, Standard had 742 open accounts and 1063 company-operated stations, or, as they have been called in this case, employee-operated stations.

The evidence in the record shows beyond cavil that the effect of these agreements was to limit the dealer operating under any of them to the handling of petroleum products of Standard and also to the marketing of tires, tubes, batteries and accessories controlled or handled by Standard. If they handled others, they did not do so openly. The agreements were so interpreted by those operating under them,—as various operators from various states testified. Indeed, witnesses of the defendant very forthrightly stated that the operators were expected to confine themselves to Standard products and accessories; the exception being only those rare cases—especially during the War—when they were unable to supply the quantity asked, in which event, the supervising employees of Standard would "shut their eyes" to the infractions.

The record also shows that, as to tires, tubes, batteries and accessories, Standard reserved the right to determine the amounts it would furnish. As to the other accessories, —which included spark plugs, sun visors, fan belts, hub caps, and all small parts of automobiles, which can easily be replaced at a service station—the requirement was up to the dealer himself. Tires, tubes and batteries were not, as a rule, sold to operators of stations other than those under contract with Standard,—especially during the time of shortage. Its petroleum products and accessories were sold to other station operators, particularly after the war scarcity ended. The representatives of other companies manufacturing petroleum products, tires, tubes, batteries and other accessories, testified that they could not sell their products to stations under contract with Standard, except in rare instances, and that, surreptitiously. When a station was converted into a Standard station, whatever custom in non-Standard products they had before ceased. To maintain the goodwill of the operators of the stations, Standard assisted them financially, made loans which were later discounted, furnished many valuable services, and expended large sums of money in advertising, in educating the operators in the manner of handling the products, in building the stations, adding facilities to them, repairing and improving them,—all of which meant large expenditures of

money. As a result, Standard has a sixteen and one-half million dollar capital investment in the dealer stations.

When salesmen or supervisors of Standard found competitive products, they "urged",—as they testified—or, as the operators testified, showed their displeasure, and, practically "ordered" their discontinuance or substitution. Many of the competitive products so offered for sale and shut out of the stations under contract with Standard were produced outside of the States in which the stations were located, or were shipped in interstate commerce.

So there cannot be any question that, at least so far as these products are concerned, the practice of which the Government complains, affected the flow of goods and products in interstate commerce. (3) The character of the result and its legality, as well as the legality of the restrictive clauses themselves are questions of law.

To them we now direct our attention.

II

The Law Today

(A) *Exclusive Supply Provisions:*

The case does not require an extended review of the principles which courts have evolved in interpreting the Sherman Anti-Trust and Clayton Acts. I have had occasion to discuss the scope and nature of anti-trust legislation and its application both to activities which are local and to those which transcend state limits, in several opinions. (3)

There is another reason for confining ourselves to the more recent decisions of the Supreme Court: They have modified, to a great extent, some of the legal norms declared in prior cases. (4) And the problem in this case can be nar-

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[3] *Walling v. Jacksonville Paper Co.*, 1943, 317 U. S. 564; *United States v. South-Eastern Underwriters Association*, 1944, 322 U. S. 546-553; *United States v. Frankfort Distilleries, Inc.*, 1945, 324 U. S. 293, 296-298; *United States v. Yellow Cab Co.*, 1947, 332 U. S. 218, 224-226.

[4] *United States v. Heating & Piping & Air Conditioning Contractors Assn.*, 1940, D. C. Calif., 33 Fed. Sup. 978; *United States v. Food & Grocery Bureau of So. Calif.*, 1942, D. C. Calif., 43 Fed. Sup. 966; *United States v. Food & Grocery Bureau of So. Calif.*, 1942, D. C. Calif., 43 Fed. Sup. 974; *United States v. San Francisco Electrical Contractors Assn.*, 1944, D. C. Calif., 57 Fed. Sup. 57.

rowed down to two rather simple inquiries. They are: (a) Are agreements of the type involved in this case,—as summarized briefly in the preceding portion of the opinion—violative of either or both the statutes. Which, in reality, comes down to this: Is an agreement by an oil company, engaged in the production and distribution of petroleum products, and the sponsoring and distribution of automobile parts and accessories, which obligates a gasoline station operator to supply his full requirements of petroleum products, tires, tubes, batteries, and other accessories, from the company, *of itself*, a violation of either of the Acts? If the answer to this question is in the affirmative, the inquiry is at an end. (b) If in the negative, we must determine whether the effect of the agreement as a restraint on commerce makes it invalid under either or both Acts.

Seeking an answer to these inquiries, I begin with the assumption that the General Motors exclusive supply case (5) is still the law. Which means that, at least under the Clayton Act, an agreement by a dealer, in consideration of being permitted to deal in a certain product, that he will not sell or offer to sell any products not manufactured or handled by the particular manufacturer, is not *per se* illegal. The opinion in the General Motors case states the question involved tersely. The Court had before it an agreement which not only indirectly forbade the handling of the products of other manufacturers, but *prohibited* specifically their use or sale in these words:

> " 'Dealer agrees that he will not sell, offer for sale, or use in the repair of Chevrolet motor vehicles and chassis second-hand parts or used parts or any parts not manufactured by the Chevrolet Motor Company . . .' " (6)

This eliminated not only parts not manufactured by them, but also second-hand and used parts. A complete monopoly was achieved. At the same time, the dealer was not granted exclusive selling rights in new parts and accessories. General Motors was, therefore, free to grant to other dealers

[5] *Pick Manufacturing Co.* v. *General Motors Corp.*, 1936, 299 U. S. 3.

[6] *Pick Manufacturing Co.* v. *General Motors Corp.*, *supra*, at pp. 3-4.

in the same territory the same rights. The trial court dismissed the bill for want of equity. Affirming the decree, the Supreme Court said:

> "Upon the evidence adduced at the trial the District Court found that *the effect of the clause had not been in any way substantially to lessen competition or to create a monopoly in any line of commerce.*" (7)

I take this language to mean that, even when we are confronted with a contract which shuts out competition, we must, under the Clayton Act, determine its effect on the line of commerce.

Under the Sherman Act, the reasonableness or unreasonableness of the restraint is,—since the first Standard Oil decision in 1911,—an element to be considered. (8) *Both are questions of fact, the solution of which rests upon the conditions obtaining in each particular case.*

The Socony-Vacuum case (9) and other cases which followed it express the view that the economic wisdom or unwisdom, or the economic benefit or detriment, of a restriction on commerce is not material, especially when we are dealing with a practice, such as price-fixing, which is illegal *per se*. But, at the same time, economic effect becomes material if we are dealing with a restraint other than price-fixing, a restraint which is monopolistic. Because, when this is the situation, it must appear that there is substantial lessening of competition or monopoly under the Clayton Act, before we can place a judicial interdict on it. We find this language in the Socony-Vacuum case:

> "Secondly, the fact that sales on the spot markets were still governed by some competition is of no consequence. *For it is indisputable that that competition was restricted through the removal by respondents of a part of the supply which but for the buying program*

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[7] *Pick Manufacturing Co.* v. *General Motors Corp.*, *supra*, at p. 4 (Emphasis added).

[8] *Standard Oil Co.* v. *United States*, 1911, 221 U. S. 5, 55-62.

[9] *United States* v. *Socony-Vacuum Oil Co.*, 1940, 310 U. S. 150, 220-225; See, *Fashion Originators' Guild* v. *Federal Trade Commission*, 1941, 213 U. S. 457, 468.

would have been a factor in determining the going prices on those markets. But the vice of the conspiracy was not merely the restriction of supply of gasoline by removal of a surplus. As we have said, this was a well-organized program. The timing and strategic placement of the buying orders for distress gasoline played an important and significant role. Buying orders were carefully placed so as to remove the distress gasoline from weak hands. Purchases were timed. Sellers were assigned to the buyers so that regular outlets for distress gasoline would be available. The whole scheme was carefully planned and executed to the end that the distress gasoline would not overhand the markets and depress them at any time. And as a result of the payment of fair going market prices a floor was placed and kept under the spot markets. Prices rose and jobbers and consumers in the midwestern area paid more for their gasoline than they would have paid but for the conspiracy.

"Competition was not eliminated from the markets; but it was clearly curtailed, since restriction of the supply of gasoline, the timing and placement of the purchases under the buying programs and the placing of a floor under the spot markets obviously reduced the play of the forces of supply and demand.

"The elimination of so-called competitive evils is of no legal justification for such buying programs. The elimination of such conditions was sought primarily for its effect on the price structures. Fairer competitive prices, it is claimed resulted when distress gasoline was removed from the market. But such defense is typical of the protestations usually made in price-fixing cases. Ruinous competition, financial disaster, evils of price-cutting and the like, appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event, the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is

wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended." (10)

(B) Effect of Restriction.

What Mr. Justice Douglas says applies with greater force to a restrictive practice other than price-fixing. The fact that it may be beneficial is not material, if, in effect, it is an unreasonable restraint. (11)

Judge Learned Hand stressed these very points in the Fashion Originators' Guild case. (12) He applied the reasoning of the *Socony-Vacuum* case to a case not involving price-fixing. And, with that clarity of language so characteristic of his writing, he showed that economic benefits cannot be taken into consideration if, in fact, there be substantial restriction of commerce. The opinion says:

> ". . . Many trade combinations which affect competition are lawful, when they are designed to prevent trade 'abuses'; they are 'reasonable' though perhaps to say so is no more than to state the problem. Appalachian Coals, Inc. *v.* United States, 288 U. S. 344, 374, 53 S. Ct. 411, 77 L. Ed. 825; Sugar Institute *v.* United States, 297 U. S. 553, 598, 56 S. Ct. 629, 80 L. Ed. 859. Certainly it is not true that the lawfulness of every combination depends upon whether it 'reasonably' corrects trade 'abuses'; there are some combinations that nothing will excuse. The accepted rubric for this is that when the means are unlawful per se, the purposes of the confederates will not justify them. Sugar Institute *v.* United States, supra, 297 U. S. 553, page 599, 56 S. Ct. 629, 80 L. Ed. 859. *The most recent example of this is the Supreme Court's reaffirmation of the unconditional illegality of price-fixing in spite*

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10 *United States* v. *Socony-Vacuum Oil Co., supra,* at pp. 220-221 (Emphasis added.)

11 See, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 1948, slip decision No. 75, decided on May 10, 1943, pp. 22 *et seq.*

12 *Fashion Originators' Guild* v. *Federal Trade Commission*, 1940, 2 Cir., 114 F. (2) 80.

of the probability that the combination in fact benefited the industry. *United States* v. *Socony-Vacuum Oil Co.*, 210 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129. However grave the industrial disorders, that remedy was not permissible; the industry may restore itself by many devices, but not by all. * * * Price-fixing is not, however, the only means unlawful per se. *The interest of the consumer is not all that determines the 'reasonableness' of a contract 'in restraint of trade'. It is also unlawful to exclude from the market any of those who supply it—assuming that there is no independent reason by virtue of their conduct to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers, or to the producers who remain.* W. W. Montague & Co. *v.* Lowry, 193 U. S. 38, 47, 24 S. Ct. 307; 48 L. Ed. 608; Eastern States Retail Lumber Dealers Association *v.* United States, 234 U. S. 600, 611, 34 S. Ct. 951, 58 L. Ed. 1490, L.R.A. 1915A, 788; Binderup *v.* Pathe Exchange, 263 U. S. 291, 311, 312, 44 S. Ct. 96, 68 L. Ed. 308; Anderson *v.* Shipowners Association, 272 U. S. 359, 363, 47 S. Ct. 125, 71 L. Ed. 298, Bedford Cut Stone Co. *v.* Journeymen Stone Cutter's Association, 274 U. S. 37, 54, 47 S. Ct. 522, 71 L. Ed. 916, 54 A.L.R. 791; Paramount Famous Corp. *v.* United States, 282 U. S. 30, 43, 44, 51 S. Ct. 42, 75 L. Ed. 145; United States *v.* First National Pictures, Inc., 282 U. S. 44, 54, 51 S. Ct. 45, 75 L. Ed. 151; National Harness Association *v.* Federal Tr. Comm. 6 Cir., 276 F. 705, 712; Wholesale Grocers Ass'n *v.* Federal Tr. Comm. 5 Cir., 277 F. 657, 663; Butterick Publishing Co. *v.* Federal Tr. Comm. 2 Cir., 85 F.(2d) 522. There is another reason supporting this conclusion. A successful combination among a part of the producers to exclude others, even when not accompanied by an agreement fixing prices, puts into their hands collectively the power to control the supply and with it the price. The fact that the power is not at the moment exercised is of no assurance that it may not be; if the effort succeeds and the combination is not disrupted, it may at any time be used, and there will then be no protection to the consumer.

"*Finally, it is of no consequence that the Guild does not supply the whole market for women's dresses; it aims at a monopoly however small its share of total sales.* The reason is as follows: Although all dresses made after one design are fungibles, the different designs themselves are not fungibles. Each has its own attraction for buyers; each is unique, however trifling the basis for preferring it may be. Hence to attempt to gather to oneself all possible reproductions of a given design is to attempt to create a monopoly, as at once appears from the fact that a copyright for it—and a fortiori a design patent upon it—would be ranked as a monopoly. It is true that the sanction of that monopoly may be very weak; it depends upon the design's attractions above other designs, often not a very important margin of advantage. But the same is true of nearly all monopolies, for there are substitutes for most goods. As to each design therefor the Guild is seeking to establish a monopoly; and *it is unimportant whether its gross sales are large or small, as compared with those of all women's dresses. For these reasons, the combination was unlawful per se;* the commission was right in refusing to hear any evidence in its excuse, for it could have no excuse; the case is the same as Millinery Creators' Guild *v.* Federal Trade Commission, *supra*, 2 Cir., 109 F. (2d) 175" (13).

The teaching of these cases is this: When we are dealing with price-fixing, we are dealing with a contract which is invalid *per se* and violative of the Act. However, when we consider any other restrictions, their legality must be determined *by the nature of the contract in relation to the line of commerce which it may affect.* A contract by a manufacturer of a product which binds an agent who is used as an outlet to the exclusive use of his product *is not necessarily* a violation of either the Sherman Act or the Clayton Act. But it *may be* so under the Sherman Act, if it results in an unreasonable restraint of trade, and under

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13 *Fashion Originators' Guild v. Federal Trade Commission, supra,* at pp. 84-85 (Emphasis added).

the Clayton Act, if it results in a monopoly in a line of commerce or lessens competition substantially. (14)

The more recent decisions of the Supreme Court reaffirm these principles. (15) To quote from *Federal Trade Commission* v. *Morton Salt Company* (16):

> "The statute requires no more than that the effect of the prohibited price discriminations 'may be substantially to lessen competition . . . or to injure, destroy or prevent competition.' After a careful consideration of this provision of the Robinson-Patman Act, we have said that 'the statute does not require that the discrimination must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' Corn Products Co. *v.* Federal Trade Comm'n., 324 U. S. 726, 742. Hence the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate.
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> "Fourth. It is urged that the evidence is inadequate to support the Commission's findings of injury to competition. As we have pointed out, however, the

[14] See cases under Notes 8 to 12, inclusive. And see, Restatement of Contracts, Section 516; *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 1915, 236 U. S. 165; *Federal Trade Commission* v. *Sinclair Refining Co.*, 1923, 261 U. S. 463; *Twin City Co.* v. *Harding Glass Co.*, 1931, 283 U. S. 353; *Associated Oil Co.* v. *Myers*, 1933, 217 Cal. 297; *General Petroleum Corp.* v. *Longhead*, 1933, 218 Cal. 554; *B. S. Pearsall Butter Co.* v. *Federal Trade Commission*, 1933, 7 Cir., 292 Fed. 720; *Excelsior Motor Mfg. & Supply Co.* v. *Sound Equipment*, 1934, 7 Cir., 73 F. (2) 725.

[15] *United States* v. *Yellow Cab Co.*, 1947, 332 U. S. 218; *United States* v. *National Lead Co.*, 1947, 332 U. S. 319; *International Salt Co., Inc.* v. *United States*, 1947, 332 U. S. 392; *United States* v. *National Lead Co.*, 1947, 332 U. S. 319; *United States* v. *Line Material Co.*, 1947, 333 U. S. 287, 308-310; *United States* v. *United States Gypsum Co.*, 1948, 333 U. S. 364, 388-393. And see, *International Machines Corp.* v. *United States*, 1936, 298 U. S. 130, 137-140; *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 1936, 6 Cir., 83 F. (2) 764; *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 1942, 4 Cir., 132 F. (2) 48, 52-54.

[16] *Federal Trade Commission* v. *Morton Salt Company*, 1948, slip decision, No. 464, pp. 7-8.

Commission is authorized by the Act to bar discriminatory prices upon the 'reasonable possibility' that different prices for like goods to competing purchasers may have the defined effect on competition. That respondent's quantity discounts did result in price differentials between competing purchasers sufficient to influence their resale price of salt was shown by evidence."

The following quotation from the American Crystal Sugar case is also enlightening:

"The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. United States *v.* Socony-Vacuum Oil Co., 310 U. S. 150; American Tobacco Co. *v.* United States, 328 U. S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. United States *v.* South-Eastern Underwriters Assn. *supra,* at 553.

"Nor is the amount of the nation's sugar industry which the California refiners control relevant, *so long as control is exercised effectively in the area concerned.* Indiana Farmer's Guide *v.* Prairie Farmer, 293 U. S. 268, 279, United States *v.* Yellow Cab Co., 332 U. S. 218, 225, *the conspiracy being shown to affect interstate commerce adversely to Congress' policy.* Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare, United States *v.* Darby, 312 U. S. 100, 115, may be exercised in individual cases without showing any specific effect upon interstate commerce, United States *v.* Walsh, 331 U. S. 432, 437-438; it is enough that the individual activity when multiplied into a general practice is subject to federal control, Wickard *v.* Filburn, *supra,* or *that it contains a threat to the interstate economy that requires preventive* regulation." (17).

(C) *The Meaning of "Unreasonable" and "Substantial".*

What precedes calls for a further inquiry into what is or what is not unreasonable restraint and what is or what is not a substantial lessening of competition.

The words "reasonable" or "unreasonable" do not occur in the Sherman Anti-Trust Act. (17) They were read into the Act by the decisions of the Supreme Court. (18)

The phrases which forbid practices which result in substantial lessening of competition or monopoly occur in the Clayton Act. (19)

All these terms have a pragmatic content. The Courts, in applying them, have sought to evolve concrete criteria by which the effect of a particular practice on competition should be gauged. Their scope and limit was stated by the Court in *Fashion Originators' Guild of America* v. *Federal Trade Commission*:

> "If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition. From its findings, the Commission concluded that the petitioners, 'pursuant to understandings, arrangements, agreements, combinations and conspiracies entered into jointly and severally' had prevented sales in interstate commerce, had 'substantially lessened, hindered and suppressed' competition, and had tended 'to create in themselves a monopoly'. And paragraph 3 of the Clayton Act (15 U.S.C.A. Sec. 14) declares 'It shall be unlawful for any person engaged in commerce, . . . to . . . make a sale or contract for sale of goods, . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods, . . . of a competitor or competitors of the . . . seller, where the effect of such . . . sale, or contract for sale

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[17] *Mandeville Island Farms, Inc. et al.* v. *American Crystal Sugar Company*, 1948, slip decision No. 75, p. 16.

[18] *Standard Oil Co.* v. *United States*, 1911, 221 U. S. 5, 55-62.

[19] 15 U.S.C.A., Sec. 14.

. . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' The relevance of this section of the Clayton Act to petitioners' scheme is shown by the fact that the scheme is bottomed upon a system of sale under which (1) textiles shall be sold to garment manufacturers only upon the condition and understanding that *the buyers will not use or deal in textiles which are copies from the designs of textile manufacturing Guild members;* (2) *garment manufacturers shall sell to retailers only upon the condition and understanding that the retailers shall not use or deal in such copied designs.* And the Federal Trade Commission concluded in the language of the Clayton Act that these understandings substantially lessened competition and tended to create a monopoly. We hold that the Commission, upon adequate and unchallenged findings, correctly concluded that this practice constituted an unfair method of competition.

"Not only does the plan in the respects above discussed thus conflict with the principles of the Clayton Act; the findings of the Commission bring petitioners' combination in its entirety well within the inhibition of the policies declared by the Sherman Act itself. Section 1 of that Act makes illegal every contract, combination or conspiracy in restraint of trade or commerce among the several states; Sec. 2 makes illegal every combination or conspiracy which monopolizes or attempts to monopolize any part of that trade or commerce. Under the Sherman Act 'competition not combination should be the law of trade.' National Cotton Oil Co. *v.* Texas, 197 U. S. 115, 129. And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: *it narrows the outlets to which garment and textile manufacturers can sell and the sources from retailers can buy.* (Montague & Co. *v.* Lowry, 193 U. S. 38, 45; Standard Sanitary Mfg. Co. *v.* United States, 226 U. S. 20, 48-49); subjects all retailers and manufacturers who decline to comply with the Guild's program to an

organized boycott (Eastern States Retail Lumber Dealers' Assn. *v.* United States, 234 U. S. 600, 609-611); takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs (United States *v.* American Linseed Oil Co., 262 U. S. 371, 389); *and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs* (United States *v.* American Linseed Oil Co., *supra*, at 389). In addition to all this, the combination is in reality an extra-governmental agency, which prescribed rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.' (Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 242).

"Nor is it determinative in considering the policy of the Sherman Act that petitioners may not yet have achieved a complete monopoly. For '*it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition.*' (United States *v.* E. C. Knight Co., 156 U. S. 1, 16; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 237.'" (20)

The approach to the problem has changed, as later cases indicate, (21) but the test of reasonableness is the same which the court laid down in the first case (22). As there stated, while the Act defines the boundaries which could not be transgressed, it leaves the application of the standard ~~laid down~~

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[20] *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 1941, 312 U. S. 457, 463-466 (Emphasis added); And see, *Eastern States Retail Lumber Dealers' Assn.* v. *United States*, 1914, 234 U. S. 600; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 1922, 258 U. S. 346, 357; *Apex Hosiery Co.* v. *Leader*, 1940, 310 U. S. 469, 489-497.

[21] *Federal Trade Commission* v. *Morton Salt Co.*, *supra*; *Mandeville Island Farms Co.* v. *American Crystal Sugar Co.*, *supra*.

[22] *Standard Oil Co.* v. *United States*, 1911, 221 U. S. 5.

"to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute." (23)

And the test under the Clayton Act is equally practical. The validity or invalidity of a contract or practice is determined by a consideration of the methods of restraint which the particular contract or practice impose and the effect which they may have. (24) The more recent cases interpret the language of the statute to include not only probable effects but also possible effects. (25)

In summary, when we are asked to determine unreasonableness of restraint under the Sherman Act, or substantially in lessening competition or tendency to create a monopoly in a line of commerce under the Clayton Act, we must envisage the entire situation affected by the practices, and relate it to the object of both statutes, which is to maintain freedom in interstate commerce and trade and to prevent all attempts to monopolize them. (26) At times, courts speak of the "detriment" to the public resulting from a practice. (27) But they do not intend to legalize restraints

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23 *Standard Oil Co.* v. *United States, supra*, at p. 64. And see, *Dr. Miles Medical Co.* v. *Park & Sons Co.*, 1911, 220 U. S. 373, 406-407; *Apex Hosiery Co.* v. *Leader*, 1940, 310 U. S. 469; *Boro Hall Corp.* v. *General Motors*, 1942, 2 Cir., 124 (F.(2) 822; *United States* v. *Aluminum Co. of America*, 1945, 2 Cir., 148 (F. (2) 416, 427-430; *United States* v. *General Motors*, 1941, 7 Cir., 121 F. (2) 376.

24 *Judson L. Thompson Mfg. Co.* v. *Federal Trade Commission*, 1945, 1 Cir., 150 F. (2) 952, 955-958.

25 *Wickard* v. *Filburn*, 1942, 317 U. S. 111, 118-125; *Federal Trade Commission* v. *Morton Salt Co., supra*, at pp. 7-8; *Manderville Island Farms, Inc.* v. *American Crystal Sugar Co., supra*, at pp. 14-19; compare *Standard Fashion Co.* v. *Magrane-Houston Co.*, 1922, 258 U. S. 346, 356-357; *Corn Products Refining Co.* v. *Federal Trade Commission*, 1945, 324 U. S. 726, 738.

26 *Parker* v. *Brown*, 1943, 317 U. S. 338, 351; *United States* v. *Heating, Piping & Air Conditioning Contractors*, 1940, D. C. Calif., 33 Fed. Sup. 978, 979; *United States* v. *San Francisco Electrical Contractors' Assn.*, 1944, 57 Fed. Sup. 57, 60.

27 *Standard Oil Co.* v. *Federal Trade Commission*, 1922, 2 Cir., 282 Fed. 81; *Federal Trade Commission* v. *Sinclair Refining Co.*, 1923, 261 U. S.

which *may be* beneficial to the public. As said by Judge Learned Hand:

> "Be that as it may, that was not the way that Congress chose; it did not condone 'good trusts' and condemn 'bad ones'; it forbade all. Moreover, in so doing it was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes. It is settled, at least as to Sec. 1, that there are some contracts restricting competition which ~~are un~~lawful, *no matter how beneficient they may be; no industrial urgency will justify them; they are absolutely forbidden.* Chief Justice Taft said as much of contracts dividing a territory among producers, in the often quoted passage of his opinion in the Circuit Court of Appeals in United States *v.* Addyston Pipe & Steel Co., 6 Cir., 85 Fed. 271, 46 L.R.A. 122." (28)

The harm to the public is gauged by the effect of the practices on the free flow of goods in interstate commerce and the maintenance of competition in that field. Consequently, practices which are likely to curtail or affect injuriously a measurable or sizeable part of commerce are prohibited under both Acts. As I understand the pleadings, and the Government's position at the beginning of the trial, a judgment is sought decreeing that the clause in the contracts which, by its language and actual effect, as shown by the evidence, restricts the stations not employee-operated

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463, 474-475; *International Shoe Company* v. *Federal Trade Commission*, 1930, 280 U. S. 291, 297-298; *United States* v. *Standard Oil Co. of New Jersey*, 1931, D. C. Mo., 47 Fed. (2) 288; *United States* v. *Socony-Vacuum Oil Co.*, 1940, 310 U. S. 150, 220-221.

[28] *United States* v. *Aluminum Company of America*, 1945, 2 Cir., 148 F. (2) 416, 427.

to the sale and use of petroleum products and accessories produced or supplied by Standard is illegal *per se*. We cannot agree. To the contrary, as we read the cases, exclusiveness of outlet is not, in itself, illegal. It becomes illegal only if it results in a substantial lessening of competition or the creation of monopoly in the line of commerce. (29) Indeed, the opinion of the Court in one of the latest cases on the subject indicates clearly that,—to use the language of Mr. Justice Douglas,—"the use of monopoly power, however lawfully acquired, to foreclose competition, *to gain a competitive advantage or to destroy a competitor*, is unlawful." (30)

The phrase "line of commerce" in the Clayton Act is to be given a broad and not a narrow meaning. It should be interpreted, not with relation to a particular outlet, but with relation to the entire "picture",—if one may be permitted to use the best colloquial equivalent to the German word *gestalt* (configuration). So the determination of monopoly in any "line of commerce" cannot be made to rest *solely* on the fact that certain outlets are closed. For, without indulging in a *reductio ad absurdum*, if we say that interfering with *any* outlet is, in itself, a monopoly, we find ourselves in the position of contending that, assuming one controlled one station outlet, we have a monopoly as to it. To amplify: It is common knowledge that national merchandising firms like Sears, Roebuck & Company, or Montgomery Ward, own establishments the country over. It is also well known that they control the type of goods which are sold in the branches, which they use as outlets, and which they own. But, assume that they did not own the branches, and that they operated some of them, under one of these various contract arrangements used here,—say a TBA contract. To my mind, it would be unrealistic to contend that, under

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29 *Donovan v. Pennsylvania Co.*, 1905, 199 U. S. 279, 296-302 (cited with approval in *United States v. Yellow Cab Co.*, 1947, 332 U. S. 218, 229); *Pick Mfg. Co. v. General Motors Corp.*, 1936, 299 U. S. 3; *Pick Mfg. Co. v. General Motors Corp.*, 1935, 7 Cir., 80 F. (2) 641; *Boro Hall Corp. v. General Motors Corp.*, 1942, 2 Cir., 124 F. (2) 822; *International Salt Co. v. United States*, 1947, 330 U. S. 392; *United States v. Griffith etc.*, slip decision No. 64, decided May 3, 1948, p. 7.

30 *United States v. Griffith, supra*, at page 7.

such circumstances, the control of one or several such outlets would constitute a monopoly. For this reason, I take the words "in any line of commerce" to mean a complete line of activity, not a *small* segment. This interpretation finds support in the following language of the Supreme Court:

> "The exercise of Congressional power under the Sherman Act, the Clayton Act, the Federal Trade Commission Act, or the National Motor Theft Act, has never been thought to be constitutionally restricted because in any particular case the volume of the commerce affected may be small. *The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication.*" (31)

We must, therefore, ascertain the *actual* effect of the challenged clause on interstate commerce.

(D) *Intra and Interstate Activities*

Before doing so, we refer to the contention that the activities of Standard are local in character. Recent cases have obliterated the rigid distinction between intrastate and interstate activities. Activities purely local which interfere with interstate commerce come under the interdiction of the anti-trust statutes. (32) The control of a commodity originating in interstate commerce, although exercised after it comes to rest in a state, does not take it out of the purview of the Sherman or Clayton Acts, if the flow is continuous, and if the restrictions affect it. (33) The latest decisions

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[31] *National Labor Relations Board* v. *Fainblatt*, 1939, 306 U. S. 600, 606; and see, *Signode Steel Strapping Co.* v. *Federal Trade Commission*, 1942, 4 Cir., 132 F. (2) 48, 54.

[32] See cases cited in *United States* v. *Heating, Piping & Air Conditioning Contractors' Ass'n.*, 1940, D. C. Calif., 33 Fed. Sup. 978, and *United States* v. *Francisco Electrical Contractors' Ass'n*, 1944, D. C. Calif., 57 Fed. Sup. 57.

[33] *Mandeville Island Farms Co.* v. *American Crystal Sugar Co.*, 1948, slip decision, pages 14-15.

give effect to the broad definition of commerce contained in one of the older and leading cases on the subject:

> "The evidence shows that they and other defendants conspired to burden the free movement of live poultry into the metropolitan area. It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. Public Utilities Comm'n *v.* Landon, 249 U. S. 237, 245; Missouri *v.* Kansas Gas Co., 265 U. S. 298, 309; East Ohio Gas Co. *v.* Tax Comm'n. 283 U. S. 465, 470-471. But we need not decide when interstate commerce ends and that which is intrastate begins. *The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce.*" (34)

Without detailing the distributive system used by Standard, it is evident that there is constant interstate flow of the products it produces and distributes. And the interstate origin of the many competitive products, automobile supplies and accessories is also established. (35)

This satisfies fully the requirement of the statutes. For, if the exclusive supply agreements complained of by the Government be unreasonable or monopolistic in effect, they would affect the flow of commerce in several ways: (1) by channeling the products of Standard, regardless of interstate or intrastate source, through an exclusive group of

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[34] *Local 167 National Brotherhood of Teamsters* v. *United States*, 1934, 291 U. S. 286, 297 (Emphasis added); See, *Allen Bradley* v. *Local Union No. 3*, 1945, 325 U. S. 797, 810-811; *United Brotherhood of Carpenters* v. *United States*, 1947, 330 U. S. 395.

[35] See end of Part I and cases cited in Note 3. See also, *United States* v. *Yellow Cab Co.*, 1947, 332 U. S. 218, 224-228; *McComb* v. *Herlihy*, 1947, 4 Cir., 161 F. (2) 568, 570-571; see my opinion in *Devine* v. *Handy*, 1948, D. C. Calif., 76 Fed. Sup. ——. And for a comprehensive survey of the recent broadening of the concept of commerce, see, *Stern*, *The Commerce Clause* and *The National Economy*, 1933-1946, 59 Harvard Law Review, 1946, pp. 645, 883.

outlets; (2) by denying to dealers the right to buy them; and (3) by denying to manufacturers of competitive products the right to sell to the controlled outlets.

Whether they actually have such effect is our final inquiry.

III

The Consequences of the Exclusive Supply Provisions

(A) *The "Appreciable Segment" Test*

In the Associated Press case (36), the Supreme Court has set out criteria for determining the forbidden character of restrictive outlets under the Sherman Act, which are pertinent to the facts in this case:

> "The restraint on trade in news here were no less than those held to fall within the ban of the Sherman Act with reference to combinations to restrain trade outlets in the sale of tiles, Montague & Co. *v.* Lowry, 193 U. S. 38; or enameled ironware, Standard Sanitary Mfg. Co. *v.* United States, 226 U. S. 20, 48-49; or lumber, Eastern States Lumber Dealers' Ass'n *v.* United States, 234 U. S. 600, 611; or women's clothes, Fashion Originators' Guild *v.* Federal Trade Commission, supra; or motion pictures, United States *v.* Crescent Amusement Co., 323 U. S. 173. Here as in the Fashion Originators' Guild case, supra, 465, 'the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.' Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 242. By the restrictive By Laws each of the publishers in the combination has, in effect, 'surrendered himself completely to the control of the association.', Anderson *v.* Shipowners' Assn., 272 U. S. 359, 362, in respect to the disposition of news in interstate commerce. Therefore

[36] *Associated Press* v. *United States,* 1945, 326 U. S. 1.

this contractual restraint of interstate trade, 'designed in the interest of preventing competition', cannot be one of the 'normal and usual agreements in aid of trade and commerce which may be found not to be within the (Sherman) Act . . .'' Eastern States Lumber Dealers' Assn. v. United States, supra, 612, 613.'' (37)

This is anticipatory of the criterion of ''appreciable segment'' as a test of unreasonableness or monopolistic substantiality, established in later cases. (38)

Some writers have expressed the view that the more recent decisions, and especially the Yellow Cab decision, substitutes a new and uniform concept or standard of illegality for the older ones under the Sherman Act, which considers the effect on ''an appreciable segment'' of commerce the test. They see in this the abandonment of the older, ''quantitative'' postulate which related the amount of the commerce involved to the whole commerce in the nation. (40) But I find the nucleus of this norm not only in the Associated Press case (41), but in older cases. (42) Thus, in a case involving control of advertising media in a certain field as the basis for a damage action under the Sherman Anti-Trust law, the Supreme Court held that it was invalid, although it applied to a limited geographic area or to a part of the commerce only. The Court used this language:

''The record contains no suggestion by respondents or by either court that petitioner's allegations are not sufficient to charge a violation of Secs. 1 and 2. Its right to recover does not depend upon the proportion that respondents control of the total farm paper advertisements in the entire country, and it was not required to prove that respondents imposed a restraint

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37 *Associated Press* v. *United States, supra,* pp. 18-19.

38 *United States* v. *Yellow Cab Co.,* 1947, 332 U. S. 218, 224-228.

39 *United States* v. *Yellow Cab Co., supra,* at p. 218.

40 See Zlinkoff & Barnard: *The Supreme Court and a Competitive Economy,* 1947, 47 Columbia Law Review, pp. 914, 926-932.

41 *Associated Press* v. *United States,* 1945, 326 U. S. 1.

42 *Indiana Farmer's Guide Co.* v. *Prairie Farmer Publishing Co.,* 1934, 293 U. S. 268.

or attempted monopolization that would affect all commercial advertisements in all farm papers wherever published or circulated. The provisions of Secs. 1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce. Standard Oil Co. *v.* United States, 221 U. S. 1, 61." (43)

And there is one lower court, well considered decision which found an illegal restriction in a limitation to a particular large customer,—the United States Government. (44)

It was insisted at the oral argument that the late cases, especially the Yellow Cab case (45), having arisen under the Sherman Act, do not control here. Granted that these rulings interpret that Act, they are, nonetheless, applicable to the present case for the obvious reason that the violations which the Government in this case charges are violations of both the Sherman and Clayton Acts.

As a rule, language used in interpreting one statute is not conclusive of the meaning of other kindred statutes. However, the history of Anti-Trust legislation shows that less is required to prove illegality under the Sherman Act than under the Clayton Act. Rightly. For the object of the Clayton Act was to declare illegal, in their incipiency, acts which would only be illegal under the Sherman Act *in their full fruition*. Differently put, what, *in its result*, is an unreasonable restraint under the Sherman Act is, *in its beginning*, a substantial restraint under the Clayton Act, *if it is of a nature* likely to achieve such result.

It is argued that to apply this criterion would result in anomolous situations: If the operators of stations, instead of agreeing to buy their "requirements" of petroleum prod-

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[43] *Indiana Farmer's Guide Co.* v. *Prairie Farmer Publishing Co., supra*, at p. 278. And see, *United States* v. *Bausch & Lomb Optical Co.*, 1944, 321 U. S. 707, 720-724.

[44] *United States* v. *Clear Flax Linen Looms, Inc.*, 1945, D. C. Minn. 63 Fed. Sup. 32.

[45] *United States* v. *Yellow Cab Co.*, 1948, 332 U. S. 218.

ucts, agreed to buy a definite quantity over a period of time, sufficient to satisfy their needs, this arrangement would, just as effectively, shut out competition. And yet, it is insisted that, although such arrangement would achieve the same result, it would not fall within any of the prohibitions of the anti-trust statutes.

But there is a distinction between the two situations. When a dealer agrees to take a specific amount of a product, there is a likelihood that *he may,* in case of failure of the supplier to comply with the agreement, or unexpected shortages or increased demands, or a desire to anticipate such shortages or demands, by overstocking,—seek competitive products. There is thus a possibility of access by competitors to the particular outlets.

Under the "requirements" contracts, the chance is completely cut off. Briefly stated, without a "requirements" contract, competitors may, in time, induce dealers to handle their products. With a contract, they never can. There is opportunity to deal with the competitors, and, hence, possibility,—nay, probability, of freedom of action, when there is no restrictive contract. There is complete and final absence of freedom of dealing during the life of a contract, when it calls for exclusion. The shut-out is just as effective as an agreement to boycott products originating in interstate commerce. (46) Both "restrain or control the supply entering and moving in interstate commerce". (47)

(B) *Restraint: Entire or Fractional:*

(1) Comparative Figures:

The turn which our consideration of the case has taken calls for a statement of additional facts which, in fairness

[46] See, *Coronado Coal Co.* v. *United Mine Workers,* 1925, 268 U. S. 295, 310; *Bedford Cut Stone Co.* v. *Stone Cutter's Ass'n,* 1927, 284 U. S. 37, 49; *Local 167* v. *United States,* 1934, 291 U. S. 293, 297; *United States* v. *Socony-Vacuum Oil Co.,* 1940, 310 U. S. 150, 212-218; *United Brotherhood of Carpenters* v. *United States,* 1947, 330 U. S. 395; and see my opinion in *United States* v. *Heating, Piping & Air Conditioning Contractors' Ass'n,* 1940, D. C. Cal., 33 Fed. Sup. 395.

[47] *Coronado Coal Co.* v. *United Mine Workers, supra,* at p. 310.

[48] See Part III, (A) and cases cited in Footnotes 36 to 45.

to the defendants, should be referred to, because they are the foundation for the contention that the practices here under attack do not violate either statute. They also serve to point to the fact that, in this case, the problem which confronts the court is to determine, in the light of the latest cases of the Supreme Court, which of the two methods of assaying specific facts which, in the main, are not in dispute, should control.

The facts to be alluded to present one facet of the problem. The practices which the Government seeks to prohibit are not of recent origin. To the contrary, they have been in effect for over 15 years. They are employed not only by Standard, but by its competitors in the Western Area, especially the "majors,"—Associated, Shell, General Petroleum, Texas Co., Union Oil Co., Richfield,—as their representatives have so forthrightly admitted. The following statistical data, culled from the record, show the comparative position of Standard in relation to its major competitors, omitting, for brevity, the comparative number of stations:

Gasoline Sales

State	Year	State Total	Retail Gallonage S. S. Inc.	Retail Gallonage Dealers	% of Total S. S. Inc.	% of Total Dealers
Calif.	1931	1,401,545	65,149	71,251	4.6	5.1
	1946	2,640,651	209,587	135,455	7.9	5.1
Oregon	1931	170,357	4,782	25,633	2.8	15.0
	1946	376,288	18,467	36,198	4.9	9.6
Wash.	1931	270,901	8,232	26,266	3.0	13.4
	1946	491,301	23,021	43,606	4.7	8.9
Ariz.	1931	99,564	1,210	11,994	1.2	12.0
	1946	170,075	11,973	16,526	7.0	9.7
Nev.	1931	22,549	303	3,576	1.3	15.9
	1946	55,079	3,785	8,287	6.9	15.0
Idaho	1931	59,293	150	5,396	0.3	9.1
	1946	143,304	2,417	14,576	1.7	10.2
Utah	1931	60,731	–	4,114	–	6.8
	1946	146,644	4,649	13,920	3.2	9.5
7 Western	1931	2,084,940	79,825	158,299	3.8	7.6
States	1946	4,023,342	273,899	268,568	6.8	6.7

Tire Replacement Shipments

State	Year	State Total	Retail Sales S. S. Inc.	Retail Sales Dealers	% of State Totals S. S. Inc.	% of State Totals Dealers
Calif.	1933	2,706,750	94,366	3,441	3.5	.1
	1946	5,985,786	130,079	79,502	2.2	1.3
Oregon	1933	328,189	15,750	1,041	4.4	.3
	1946	890,664	14,296	29,073	1.5	3.4
Wash.	1933	588,141	15,750	2,557	2.7	.4
	1946	1,244,310	14,296	30,688	1.1	2.5
Ariz.	1933	123,477	6,220	4,538	5.0	3.7
	1946	307,803	10,060	16,152	3.3	4.4
Nevada	1933	38,993	1,059	1,442	2.7	3.7
	1946	98,235	3,000	4,307	3.1	4.4
Idaho	1933	133,225	397	11	.3	2.4
	1946	327,450	2,294	9,511	.7	2.9
Utah	1933	136,475	132	21	.1	.0
	1946	327,450	3,530	10,229	1.1	3.1
Seven Western States	1933	4,055,250	132,350	10,523	3.3	.3
	1946	9,181,698	176,496	179,462	1.9	2.0

Replacement Battery Sales

State	Year	State Total	Retail Sales S. S. Inc.	Retail Sales Dealers	% of State Total S. S. Inc.	% of State Total Dealers
Calif.	1933	718,108	17,670	58	2.5	–
	1946	1,601,511	51,328	21,281	3.2	1.3
Oregon	1933	87,070	1,455	17	1.7	–
	1946	238,299	4,376	5,083	1.8	2.1
Wash.	1933	156,036	2,240	42	1.4	–
	1946	332,918	6,042	7,366	1.8	2.2
Ariz.	1933	32,759	806	33	2.5	0.1
	1946	82,353	3,542	3,877	4.3	4.7
Nevada	1933	10,345	134	24	1.3	0.2
	1946	26,383	1,459	1,120	5.6	4.3
Idaho	1933	35,345	68	–	0.2	–
	1946	87,610	1,042	2,369	1.2	2.7
Utah	1933	36,207	22	–	0.1	–
	1946	87,610	1,667	1,982	1.9	2.3
Seven Western States	1933	1,075,870	22,395	174	2.1	–
	1946	2,456,584	69,456	43,078	2.8	1.8

Certain general inferences were drawn from these facts, at the argument. They are: The actual increase in the sale of petroleum products corresponds to the rise in the whole industry. The number of outlets over a period of ten years has been reduced from an average of 7650 to 6000. Between 1936 and 1946, Standard sales of gasoline increased 58.8 per cent. The industry increase for the same period was 64.7 per cent. For lubricating oil, Standard's increase was 62.9 per cent, the industry increase, 104.8 per cent. As to

batteries, the increase in units for Standard was 46.5 per cent, for the industry, 41.8 per cent. The comparative figures, as to the increase for some of the other companies are: *Gasoline*: Union Oil Company, 90 per cent; General Petroleum, 165 per cent; and Tidewater Associated, 34 per cent. *Lubricating Oil*: Union Oil Company, 98.2 per cent; General Petroleum, 174.9 per cent; and Tidewater Associated, 54.8 per cent.

Macmillan dispenses their lubricating oil through some 10,000 accounts in the seven Western states. For Pennzoil Company, the outlets in 1916 were 2000, in 1946, 12,000. For Arthur Haven Company, the outlets were 3500 in 1946, in 1947, 7,000. During this period, the number of outlets for Standard was 5197. During the same period, the number of independent stations which handle gasoline of different companies, or, what has been referred to as "split pump" accounts, has increased, although they represent only 1.6 per cent of all the stations. Between 1931 and 1941, —a ten-year period,—Standard constructed only 8 per cent of the newly constructed service stations upon vacant sites. Between 1942 and 1947, Standard's proportion of new construction was 8.7 per cent.

(2) The Other Side of the Shield:

The other aspect of the problem must take into consideration the following facts: The gallonage of gasoline marketed has risen and the value of the commerce in petroleum and other products was $68,000,000.00 in 1947. The following statistical data bear on the extent of this commerce.

Total gross quantities of gasoline shipped from Standard Oil Company of California refineries (Richmond, El Segundo and Bakersfield)

Year	Calif.	Ariz.	Nevada	Oregon	Wash.	Utah	Idaho
1946	15,371,753	698,933	391,715	3,289,260	3,827,403	45,351	2,254
1947	18,106,788	931,199	418,062	3,707,282	3,161,576	36,551	920

Note: Gasoline shipped above is in general delivered to Company's storage. Requirements of all classes of trade are filled from such storage, and the Company has no records which would show what part of the above gasoline was received for distribution or sale to retail outlets.

* * * * *

Total gross quantities of automobile lubricating oils sold by Standard Oil Company of California and Standard Stations, Inc. Such oils were shipped from Richmond and El Segundo Refineries (42 Gal. Barrels)

Year	Calif.	Ariz.	Nevada	Oregon	Wash.	Utah	Idaho
1946	492,226	27,012	9,569	63,525	79,982	17,016	14,177
1947	570,012	26,549	9,503	62,002	81,153	18,665	14,955

Note: Company records are not kept showing shipments by state of destination. Above represents sales by States—export sales are no shown.

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Total Gross Quantities of Gasoline Purchased or Acquired By Standard Oil Company of California
(Other Than From Its Own California Refineries)

	Calif.	Ariz.	Nev.	Ore.	Wash.	Utah	Idaho	N. M.	Texas
1946									
State from which shipped	....		....	....	....	639,458	....	4,032	233,570
State of destination	....	237,602	....	....	....	471,735	168,083	....	....
1947									
State from which shipped	....	....	....	....	....	829,189	....	13,368	101,307
State of destination	....	114,675	....	....	....	630,146	199,043	....	....

Note: Gasoline received above is in general delivered to Company Storage. Requirements of all classes of trade are filled from such storage and the Company has no records which would show what part of the above gasoline was received for distribution or sale to retail outlets.

Note: The above gasoline was acquired by purchase.

[Continued on next page]

Total Gross Quantities of Gasoline Sold By Standard Oil Company of California to Retail Dealers—(42 Gallon barrels)

Year	Calif.	Ariz.	Nev.	Oregon	Wash.	Utah	Idaho
1946	3,225,122	393,467	197,310	861,865	1,038,245	331,431	347,054
1947	2,937,558	431,385	223,973	1,040,264	1,233,551	365,244	393,200

Total Gross Quantities of Automotive Lubricating Oil Sold Retail Outlets Operated By Standard Oil Company of California (Standard Stations, Inc.) (42 Gal. Barrels)

Year	Calif.	Ariz.	Nev.	Oregon	Wash.	Utah	Idaho
1946	72,928	8,871	4,450	19,475	23,448	7,469	7,830
1947	77,128	8,432	4,373	20,342	24,148	7,134	7,686

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Total Gross Quantities of Gasoline Sold At Retail Outlets Operated By Standard Oil Company of California (Standard Stations, Inc.) (42 Gallon Barrels)

Year	Calif.	Arizona	Nevada	Oregon	Wash.	Utah	Idaho
1946	4,990,166	285,078	90,125	439,695	548,110	110,693	57,548
1947	5,343,288	293,355	112,179	502,070	604,133	121,109	67,200

* * * * *

Total Gross Quantities of Automotive Lubricating Oils Sold at Retail Outlets Operated By Standard Oil Company of California (Standard Stations, Inc.) (42 Gallon Barrels)

1946	80,064	5,836	1,796	8,213	10,458	2,317	1,272
1947	77,265	5,210	1,969	8,311	10,380	2,259	1,369

* * * * *

Total number of tires, tubes, batteries and other automotive accessories shipped by companies manufacturing or supplying the same to Standard Oil Company of California and/or Standard Stations, Inc., or to others on the order of Standard Oil Company of California and/or Standard Stations, Inc., from States outside of California, Oregon, Washington, Arizona, Nevada, Idaho and Utah.

1946

State into which shipped	Tires	Tubes	Batteries
California	......	19,998	4,950
Oregon	......	......	.....
Washington	......	......	.....
Arizona	......	......	.....
Nevada	......	......	.....
Utah	......	......	.....
Idaho	......	......	.....
Total	......	19,998(1)	4,950(2)

1947

State into which Shipped	Tires	Tubes	Batteries
California	31,158	......	1,692(3)(4)
Oregon	8,459	5,004	800(4)
Washington	10,226	......	.....
Arizona	3,969	......	1,268(3)
Nevada	......	......	.....
Utah	3,509	......	879
Idaho	......	......	.....
Total	57,321(5)	5,004(1)	4,639

Note: Source: (1) Alabama; (2) Pennsylvania; (3) Texas; (4) Oklahoma; (5) Michigan.

(3) The Inconclusiveness of Comparative Figures:

Over the Government's objection, I allowed many comparative statistics, of which the foregoing are examples, to go into the record. This was consistent with the view that in resolving the issues of this case, the potential or actual effect of the agreements is important in determining reasonable of restraint under the Sherman Act and substantiality of restraint or tendency to create monopoly under the Clayton Act.

But, while the comparative figures bear on the question, they are not determinate. Substantiality of restraint or tendency to create monopoly is established by (a) the market foreclosed,—here represented by the controlled units,—and (b) the volume of controlled business, totalling here in value $68,000,000.00.

Fractionally speaking, the business done by the competitors with their own outlets or with those under contract is much greater than the business of Standard,—both in volume and in money value. Nevertheless, the business of Standard is considerable. In effect, it amounts to a sub-

stantial lessening of competition and a monopoly of a sizeable segment of a line of commerce in a definite area—the seven Western states. What has *the tendency* to achieve such result becomes, *in actual effect*, an unreasonable restraint. Even before adopting the "appreciable segment" test (48), the Supreme Court sought to avoid a rigid formula for finding reasonableness or unreasonableness. In the *Trenton Potteries* case, Mr. Justice Stone stated:

> "Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists, as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it *are based upon the assumption that the public interest is best protected from the evils of monopoly * * * by the maintenance of competition.*" (49)

It follows that there is illegal restraint here under both Acts, whether the commerce be considered quantitatively or comparatively.

(4) Application to Sub-leases and Open Accounts.

We need not dwell at length on the contention that the stations operated under a sub-lease or on open account must be omitted from consideration. It is true that the Clayton Act (50) speaks of leases of goods. And it may

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[49] *United States v. Trenton Potteries*, 1926, 273 U. S. 392, 397. (Emphasis added)

[50] 15 U.S.C.A., Sec. 14; *Curtis Publishing Co. v. Federal Trade Commission*, 1921, 3 Cir., 270 Fed. 881, 906; *Associated Oil Co. v. Meyers*, 1933, 217 Cal. 297, 304-306.

be conceded that the statute does not apply to leases on real property. And, generally speaking, a sub-lease is not a lease. But, as I stated at the oral argument, the designation which the parties have given to an instrument is not conclusive. We are dealing with an important governmental policy of long duration, established by a statute which became effective on July 2, 1890 (51), and implemented by a subsequent statute, which became effective on October 14, 1914 (52). Our duty is to give effect to it. If the practices involved in the case are contrary to the provisions of either statute, the character of the instrument in which they are contained is not important. The Sherman Act refers to contracts. (53) The Clayton Act refers to leases, sales or contracts. But, in setting the boundaries of illegality, it speaks of conditions, agreements, or understandings that the lessee or purchaser shall not use or deal in competitive goods, and which may result in the restraints condemned by the statute. (54) The Complaint is drawn under both statutes. Ordinarily, a lease deals with the term, the rent to be paid, and the type of business to be conducted on the premises. But, if, in addition, it says whose goods or products should be handled on the premises, we have a condition, agreement or understanding which has nothing to do with the lease proper, and which is within the scope of our inquiry. And if the exclusive supply undertaking, whether contained in a lease, or lurking behind an open account, has the effect condemned by the statute, it is within its prohibitions.

(5) Source of Products.

For the purpose of distributing the petroleum products, both in bulk and packaged, supplied by the California refineries of Standard, the territory is divided into twenty-

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[51] 15 U.S.C.A., Sec. 1.

[52] 15 U.S.C.A., Sec. 14.

[53] 15 U.S.C.A., Sec. 1.

[54] 15 U.S.C.A., Sec. 14.

[55] See, *United Shoe Machinery Co. v. United States*, 1922, 258 U. S. 451, 457-458; *Standard Fashion Co. v. Magrane-Houston Co.*, 1922, 258 U. S. 346, 354-355.

three distributive areas. These areas are supplied bulk products by tank cars or tank trucks from various points, which, in turn, are supplied by tanker from the refineries.

Package goods are supplied by box cars and package trucks from the various refineries. For this purpose, the territory is divided into four areas. The accessories are supplied from eight accessory warehouses, their location and the dealers they serve being:

San Francisco—serves Central and Northern California; also dealers in Northwestern Nevada; also Lakeview District in Southern Oregon.

Salt Lake City—serves all Utah, Arizona, North of Grand Canyon, Eastern and Northern Nevada and Southeastern Idaho.

Phoenix—confined to the State of Arizona and Needles across the Colorado River in California.

Los Angeles—Southern California and Southern Nevada.

Fresno—within the State of California.

Portland—Oregon, Southern Washington and Southwestern Idaho.

Seattle—Washington only.

Spokane—Eastern Washington and Northern Idaho.

The point is pressed that some of the products, such as gasoline, are supplied to California stations exclusively from California refineries. And it is argued that, so far as the California stations are concerned, their dealings in gasoline are beyond the purview of interstate commerce.

We are not dealing here with commerce in different articles. We are dealing with contracts and practices which are alleged to be illegal under the Anti-Trust Acts. These contracts, which have been epitomized in the first part of this opinion (56), cover *specifically* all petroleum products and tires, tubes and batteries. They also affect dealings in other accessories. We need not, therefore,—nay, we cannot—make a segregation, so as to exclude any item which may have both state provenance and destination in the Western area. The contract is an entirety and cannot be split. More, under the Clayton Act, if a contract has a

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[56] See Part I of Opinion.

tendency to lessen competition substantially, or to create a monopoly, the fact that it may also affect the movement of goods in intrastate commerce does not validate it, if its whole effect is likely to be a lessening of competition or monopoly in a sizeable and measurable segment of interstate commerce. In interpreting statutes of this character, and, generally, any legislation which aims to carry into effect the plenary power of the Congress to regulate commerce, it is accepted constitutional doctrine that the power to control is not destroyed by the mere fact that purely intrastate activities may also be reached by it. (57)

More, as already shown, there is a constant flow in interstate commerce of these products and supplies. (58) The contracts affect, and the transactions under them are in the course of, interstate commerce. And the practice must also be considered from the effect on the dealers and the competitive suppliers. If, as to them, it results in an effective lock-out of a considerable supply of goods of interstate source, the contracts which carry the practice into effect are invalid.

V

Conclusion and Findings

(1) Summary of Conclusions:

So we come to the end of our discussion. Grant that, on a comparative basis, and in relation to the entire trade in these products in the area, the restraint is not integral. Admit also that control of distribution results in lessening of costs and that its abandonment might increase costs. Despite all this, there confronts us the inescapable fact that such "balanced distribution"—as counsel for the defendants characterize it,—calls for concentration of representation, which, in turn, results in an unreasonable restriction of trade, and a substantial lessening of competition, so far as the 5197 outlets, their independent operators and those

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[57] See Part II-(D), and cases cited in Footnotes 32 to 35. And see, *United States* v. *Wrightwood Dairy Co.*, 1942, 315 U. S. 110; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 1942, 314 U. S. 498; and see my opinion in *Hall* v. *Southern Pacific Co.*, 1947, D. C. Calif., 71 Fed. Sup. 21, 23-24.

who seek to supply them, are concerned. As the restriction corners a market of the value of $68,000,000.00, it is illegal, even considered on a comparative basis. Concede further, that the arrangement was entered into in good faith, with the honest belief that control of distribution and consequent concentration of representation were economically beneficial (58) to the industry and to the public, that they have con-

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[58] *United States* v. *Trenton Potteries*, 1926, 273 U. S. 392, 397; and see cases cited in Footnotes 9 to 13. General statements on discontinuity as an element in fixing the intrastate character of a transaction, such as those quoted and relied on, from *Jewel Tea Co.* v. *Williams*, 1941, 10 Cir., 118 F. (2) 203, 206-207, are not very helpful. They must be evaluated only in relation to the situation under review in the particular case, and in the light of the later Supreme Court decisions, which have modified greatly the concept they seek to perpetuate. The case in which they are found was decided *in 1941*. In *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, *decided in 1944*, the Supreme Court refused to apply rigidly the formula of pause or stoppage. The Court said:

> "The record reveals, however, that the goods in both of these two categories are ordered pursuant to a preexisting contract or understanding with the customer. It is not clear whether the decision of the Circuit Court of Appeals includes these two types of transactions in the group of prior orders which it held were covered by the Act. We think they must be included. Certainly they cannot be distinguished from the special orders which respondent receives from its customers. Here also, *a break in their physical continuity of transit is not controlling. If there is a practical continuity of movement from the manufacturers or suppliers without the state, through respondent's warehouse and on to customers whose prior orders or contracts are being filled, the interstate journey is not ended by reason of a temporary holding of the goods at the warehouse. The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse.* The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate. Numerous authorities are pressed on us for the contrary view and for the conclusion that when the goods enter the warehouse, they are no longer 'in commerce.' But as we stated in *Kirschbaum* v. *Walling*, 316 U. S. 517, 520-521, decisions dealing with various assertions of state or federal power in the commerce field are not particularly helpful in determining the reach of this Act." (*Walling* v. *Jacksonville Paper Co., supra*, at pp. 568-569) (Emphasis added)

And in *Walling* v. *Mutual Wholesale Food & Supply Co.*, 1944, 8 Cir.

tinued for over fifteen years openly, notoriously and unmolested by the Government, and have been practiced by other major oil companies competing with Standard, that the number of Standard outlets so controlled may have decreased, and the quantity of products supplied to them may have declined, on a comparative basis. Nevertheless, as I read the latest cases of the Supreme Court, I am compelled to find the practices here involved to be violative of both statutes. For they affect injuriously a sizeable part of interstate commerce, or,—to use the current phrase—"an appreciable segment" of interstate commerce.

(2) Specific Findings:

So the facts proved and the legal principles applicable command the following findings:

1. The exclusive supply agreements relate to interstate commerce.

2. They affect, and the transactions under them are, in the course of, interstate commerce.

3. The relation established by the agreements between the operators and Standard is not that of employer and employee, but that of independent contractor.

4. The agreements confine the operators of stations to which they apply to dealing in Standard products, and automotive accessories handled or sponsored by them.

5. They lock out dealers from sources of competitive products originating in interstate commerce.

6. They deny to dealers access to such competitive products.

7. They deny to manufacturers or suppliers of such products access to the outlets controlled by the independent contractors who operate the stations.

F. (2) 348, 351, *decided after* the *Jacksonville Paper Co.* case, and in which *the same court* which decided the *Jewel Tea Company* case applies a more flexible concept, which accords with the latest rulings of the Supreme Court.

8. They affect a substantial number of outlets and a substantial amount of products, whether considered comparatively or not.

9. They constitute an unreasonable restraint of trade and commerce among the States, under the Sherman Anti-Trust Act. (59)

10. They result in a substantial lessening of competition and tend to create a monopoly in a line of commerce, in contravention of the Clayton Act. (60)

11. They are illegal *in their effect* and should be enjoined.

Judgment will, therefore, be for the plaintiff. The terms of the judgment are contained in an order filed simultaneously.

Dated this 7th day of June, 1948.

LEON R. YANKWICH (S.),
United States District Judge.

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[59] See Part II-(D) of opinion, and cases cited in Footnotes 32 to 35.
[60] 15 U.S.C.A., Sec. 1.
[61] 15 U.S.C.A., Sec. 14.

APPENDIX B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

No. 6159-Y Civil

UNITED STATES OF AMERICA, *Plaintiff*,

v.

STANDARD OIL COMPANY OF CALIFORNIA and STANDARD STATIONS, INC., *Defendants*

Supplemental Opinion

YANKWICH, *District Judge:*

I

The Motion to Reconsider

On the same day on which the opinion in this case was filed, June 7, 1948, the Supreme Court decided United States v. Columbia Steel Company, et al. (1) On June 16, 1948, the defendants in this case filed a notice of motion for "reopening, reargument and reconsideration." This was followed by the motion itself, which, originally noticed for June 28, 1948, was advanced to, and actually made, on June 24, 1948, and submitted. It seeks a decision, findings and judgment in favor of the defendants.

I doubt if a motion of this character, which is akin to the motion for "another and different judgment" under California practice (2), can be entertained in our court, either before or after formal findings and judgment are filed. However, neither in the case in which I expressed such doubt (3), nor in a more recent case in which a similar mo-

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1 *United States* v. *Columbia Steel Company, et al.*, No. 461, October term.

2 *California Code of Civil Procedure*, Sec. 663.

3 *Brooks Bros.* v. *Brooks Clothing Co. of California*, 1945, D. C. Calif., 5 F.R.D. 14.

tion was made (4), did I allow this to stand in the way of determining the motion on the merits. Nor will I do so now. For I grant that a judge may, at any time before finality attaches to his decision, change his views on the law of a case or the conclusions to be reached as to a controversy or a specific phase of it (5). More, it would be the imperative duty of any judge of a lower court to give effect to a decision of the highest court of the land, announced subsequent to, or simultaneously with, his decision, and which called for a modification of his views. And such action would be obligatory, whether the higher court spoke with unanimity or was divided, or even if the judge agreed with the minority opinion. When such a situation confronted me several years ago, I wrote:

> "I feel compelled by this decision to hold that the new enactment, Chapter 10 of the Bankruptcy Act, in so far as it applies to irrigation districts of the type of the petitioner, is constitutionally vulnerable, as was the old. As a student, exercising private judgment, I agree with the conclusion of the dissenters that immunity from interference through federal bankruptcy laws, even if applicable to states, should not be extended to state instrumentalities, whether they be municipal, quasi-municipal or public corporations. *However, as a judge* of a lower court, I cannot exercise private judgment, but must follow the opinion of the majority, which, as I read it, extends the immunity to all governmental agencies created by a state for the performance of public functions." (6)

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4 *Blanchard* v. *Pinkerton*, No. 7738, an opinion which was filed on May 13, 1948, but which has not yet been published.

5 See, *G. Amsinck & Co., Inc.* v. *Springfield Grocer Co.*, 1925, 8 Cir., 7 F. (2) 855, 857-858; *Continental National Bank* v. *National City Bank*, 1934, 9 Cir., 69 F. (2) 312, 317-318. While the cases just cited arose prior to the effective date of the Federal Rules of Civil Procedure, the right of a court to change its conclusions before final judgment is recognized, in cases decided since the rules went into effect. See *Marconi Wireless Co.* v. *United States*, 1943, 320 U. S. 47, 48.

6 In re Lindsay-Strathmore Irrigation District, 1937, D. C. Calif., 21 Fed. Sup. 129, 135. Emphasis added.

Counsel for the defendants who are, no doubt, familiar with our practice in this respect, have assumed that I would hear the motion on the merits. For, in addition to referring to cases which recognizes the right of a court to reconsider its decision (7), they filed simultaneously a twenty-page printed memorandum, the aim of which is to show "that the decision of the Supreme Court in United States v. Columbia Steel Company, requires a decision in favor of the defendants."

Hence the notice, the brief and the motion itself, which is now before me for decision, all call for a determination of the question propounded by the defendants whether the decision referred to commands a ruling in the present case in favor of the defendants.

II

The Scope of United States v. Columbia Steel Co.

I am of the view that it does not call for a different conclusion than that announced on June 7, 1948. At the outset, I advert to the fact that the range of the ruling ~~I made~~ is not to be determined by the arguments which the Government advanced, *but by what was actually decided.* The fact that in the *Columbia Steel Company* case the Government may have made arguments similar to those made in this case loses all significance, if, *in fact,* my ruling was contrary to the contention. To illustrate: The Government, in the present case, contended that the exclusive supply provision in the Standard contracts was illegal *per se.* I declined to so hold. On the contrary, I ruled that it was illegal *only if it resulted in an unreasonable restraint under the Sherman Act or in substantial lessening of competition under the Clayton Act.* (8) I wrote;

> "As I understand the pleadings, and the Government's position at the beginning of the trial, a judgment is sought decreeing that the clause in the contracts which, by its language and actual effect, as shown by

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[7] See cases in Footnote No. 5.

[8] See Opinion pages 11-27.

the evidence, restricts the stations not employe-operated to the sale and use of petroleum products and accessories produced or supplied by Standard is illegal *per se*. We cannot agree. To the contrary, as we read the cases, exclusiveness of outlet is not, in itself, illegal. It becomes illegal only if it result in a substantial lessening of competition or the creation of monopoly in the line of commerce." (9).

The Supreme Court in the Columbia Steel Co. case, interprets its own prior decisions, and especially the Yellow Cab decision (10), in the same manner. Mr. Justice Reed, after referring to the Government's contention that such contracts are illegal *per se*, says:

> "We do not construe our holding in the Yellow Cab case to make illegal the acquisition by United States Steel of this outlet for its rolled steel without consideration of its effect on the opportunities of other competitor producers to market their rolled steel. In discussing the charge in the Yellow Cab case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act. In the complaint the government charged that the defendants had combined and conspired to effect the restraints in question with the intent and purpose of monopolizing the cab business in certain cities, and on motion to dismiss that allegation was accepted as true. Where a complaint charges such an unreasonable restraint as the facts of the Yellow Cab case show, the amount of interstate trade affected is immaterial in determining whether a violation of the Sherman Act has been charged." (11)

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[9] See Opinion pages 27-28.

[10] *United States* v. *Yellow Cab Co.*, 1947, 332 U. S. 218.

[11] *United States* v. *Columbia Steel Co.*, slip decision, pages 24-25. It is to be observed that Mr. Justice Reed in Footnote No. 17 of the Opinion quoted a portion of the Yellow Cab opinion which laid great stress on the effect of a restraint on commerce in a given area, and which adopted the language in *Indiana Farmers Guide Co.* v. *Prairie Farmer Co.*, 1934, 293 U. S. 268, 279, which I stressed in the opinion. (See pp. 44-45 of my opinion.)

And even the adoption of the Government's contention by a lower court in one case and its rejection in another by a higher court does not, *necessarily*, mean that *the facts in both cases call for the same decision*.

III

The Grounds of the Columbia Steel Co. Decision

Unlike the present case which charged violation of *both* the Sherman and Clayton Acts, the Columbia Steel Co. case charged violation of Sections 1 and 2 of the Sherman Act only. The narrow scope of the inquiry in that case appears from this brief statement of the issues with which the opinion begins:

> "The United States brings this suit under Sec. 4 of the Sherman Act to enjoin United States Steel Corporation and its subsidiaries from purchasing the assets of the largest independent steel fabricator on the West Coast on the ground that such acquisition would violate Sections 1 and 2 of the Sherman Act. The Complaint, filed on February 24, 1947, charged that if the contract of sale between United States Steel and Consolidated Steel Corporation were carried out, competition in the sale of rolled steel products and in fabricated steel products would be restrained, and that the contract indicated an effort on the part of United States Steel to attempt to monopolize the market in fabricated steel products. After a trial before a single judge in the district court, judgment was entered in favor of the defendants, and the government brought the case here by direct appeal. 32 Stat. 823, 15 U.S.C. Sec. 29" (12).

The position of the Government in the case was weakened by the fact that on June 17, 1946, the Attorney General of the United States had approved the sale by the War Assets Administration to the United States Steel Corporation, one of the defendants, of the plant which the Government had constructed, during the war, at Geneva, Utah. The negotiations for the sale of the Consolidated plant began prior to

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[12] Slip decision, *United States* v. *Columbia Steel Co.*, p. 1.

that sale. And the purpose of the Consolidated purchase was, as stated in the opinion, with evident approval:

> "to assure a market for plates and shapes produced at Geneva, and Roach testified that Consolidated's purpose was to withdraw the stockholders' equity from the fabrication business with its cyclical fluctuations at a time when a favorable price could be realized." (13)

In effect, the court rules that Consolidated's acquisition would not have any great effect on the market, in view of the fact that its requirements are "an insignificant fraction of the total market,—less than ½ of 1%." (14)

The court was also unable to foresee the probability of the continuance of even that limited market if the sale is not completed. Mr. Justice Reed said:

> "Whether we accept the government's or Consolidated's figures, however, they are of little value in determining the extent to which West Coast fabricators will purchase rolled steel products in the eastern market in the future since the construction of new plants at Geneva and Fontana and the creation of new basing points on the West Coast presumably give West Coast rolled steel producers a far larger share of the West Coast fabricating market than before the war." (15)

And, finally, the court stressed the fact that the future dealings between Consolidated and United States Steel would be mere incidents of ownership, not illegal *per se*, and would not transgress the provisions of the Sherman Act. As Mr. Justice Reed put it:

> "A subsidiary will in all probability deal only with its parent for goods the parent can furnish. *That fact, however, does not make the acquisition invalid.* When other elements of Sherman Act violations are present, the fact of corporate relationship is material and can

[13] Slip decision, page 10.

[14] Slip decision, page 11.

[15] Slip decision, page 13.

be considered in the determination of whether restraint or attempt to restrain exists. That this is the teaching of the Yellow Cab case is indicated by the following quotation:

'and so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act. The Complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination. The theory of the complaint, to borrow language from United States *v.* Reading Co., 253 U. S. 26, 57, is that "dominating power" over the cab operating companies "was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control." If that theory is borne out in this case by the evidence, coupled with proof of an undue restraint of interstate trade, a plain violation of the Act has occurred.' That view is in accord with previous decisions of the Court.

"The legality of the acquisition by United States Steel of a market outlet for its rolled steel through the purchase of the manufacturing facilities of Consolidated depends not merely upon the fact of that acquired control but also upon many other factors. Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise, are not illegal at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product." (16)

The position of the Court was summed up in this language:

"We conclude that the co-called vertical integration resulting from the acquisition of Consolidated *does not*

16 Slip decision, pages 26-27. Emphasis added.

unreasonably restrict the opportunities of the competitor producers of rolled steel to market their product. We accept as the relevant competitive market the total demand for rolled steel products in the eleven-state area; over the past ten years Consolidated has accounted for only 3% of that demand, and if expectations as to the development of the western steel industry are realized, Consolidated's proportion may be expected to be lower than that figure in the future. *Nor can we find a specific intent* in the present case to accomplish an unreasonable restraint, for reasons which we discuss under heading III of this opinion." (17)

So, on the whole, it is evident that the decision in the Columbia Steel Co. case cannot be given the broad scope which the defendant claim for it. *It is canalized in the narrow channel which the facts in the case established.* The court did not have before it any established facts from which to determine the effect which such acquisition might have on future dealings with the acquired company in certain steel products. And there being no probability of restraining effect on interstate commerce, the court found no violation of the Sherman Act.

The minority opinion lends support to this view of the case. The majority declined to see violation in size resulting from permissible concentration of ownership. They required deleterious effects on commerce, in addition, before refusing sanction to the purchase. These they could not find or foresee. The minority, on the contrary, would have found violation in mere bigness. (18)

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17 Slip decision, page 30. Emphasis added.

18 The gist of the dissent is contained in this forceful statement:

"We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. *The Curse of Bigness* shows how size can become a menace—both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace—because of its control of prices. Control of prices in the steel industry is powerful leverage on our economy. For the price of steel determines the price of hundreds of other articles. Our price level determines in large measure whether we have prosperity or de-

In the present case, as appears from the original opinion, we are dealing *not with probabilities but with actualities.* It was proved at the trial that the challenged practices have, *in fact*, already resulted in denying to the independent operators of stations *which are not owned by the defendants*, free dealing in certain commodities in interstate commerce and locking out Standard's competitors from these outlets. And, as there are no rights incident to ownership, of the type involved in the contemplated purchase of Con-

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pression—an economy of abundance or scarcity. Size in steel should therefor be jealously watched. In final analysis, size in steel is the measure of the power of a handful of men over our economy. That power can be utilized with lightning speed. It can be benign or it can be dangerous. The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and social minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it."

Clearly, the minority, led by Mr. Justice Douglas, would stop large concentrations of ownership because they see in them the possibility of harm to the national economy through price-control and other harmful restrictions to freedom of commerce. The majority, led by Mr. Justice Reed, do not see in consolidation of economic power the unreasonable restraint condemned by the Sherman Act. (15 U.S.C.A., Secs. 1 and 2). To them, that Act does not denounce *bigness per se*, but only such control, large or small, as results, in fact, in the restrictive or monopolistic evils at which the anti-trust law is aimed.

Here, as is obvious from this and the original opinion, the injurious effect on interstate commerce of the restrictions has been shown to exist. More, the present action charges also violation of the Clayton Act (15 U.S.C.A. 14) which aims to stop monopolistic practices in their inception. Under it, a violation can be found if the practices *tend* to achieve the harm condemned by the statute, although such result has not yet been attained.

solidated Steel, the conclusions already announced must stand. The motion is denied.

Dated this 28th day of June, 1948.

LEON R. YANKWICH,
U. S. District Judge.